

JAMES N. FRANK

IBLA 2003-179R

Decided April 21, 2004

Petition for reconsideration of an order dismissing the appeal of a decision of the Alaska State Office, Bureau of Land Management, denying a Veteran Native Allotment Application. FF-93603.

Reconsideration Granted; Order Vacated and Appeal Reinstated; Decision Affirmed as Modified.

1. Alaska: Native Allotments

Section 41 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1629 (2000), permitted a “person described in subsection (b)” an “Open Season for Certain Alaska Native Veterans for Allotments,” during an 18-month period subsequent to its 1998 date of enactment. Those eligible to select an allotment under Section 41 are “veterans” who served at least 6 months between January 1, 1969, and December 31, 1971, or enlisted or were drafted into military service after June 2, 1971, but before December 3, 1971. 43 U.S.C. § 1629g(b)(1)(B) (2000).

2. Alaska: Native Allotments

Departmental regulation 43 CFR 2568.30 gives “veteran” the same meaning as that prescribed in 38 U.S.C. § 101 paragraph 2, which defines “veteran” as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. § 101 (2) (2000). “Active military, naval, or air service” is defined as including active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or

aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty or from a covered disease which occurred during such training. 38 U.S.C. § 101 (24) (2000); see also 38 CFR 3.6(a) (2002).

### 3. Alaska: Native Allotments

“Active duty” generally means “full-time duty in the Armed Forces, other than active duty for training.” 38 CFR 3.6(b) (2002); see also 30 U.S.C. § 101 (21) (2000). Persons serving in a reserve component of the military who have not been mustered into active duty in the Armed Forces are deemed to be in either active duty for training, or inactive duty for training, depending upon the nature of the duty undertaken. 38 U.S.C. § 101 (22), (23) (2000); 38 CFR 3.6(c) (2002). Whether an individual’s service constitutes active duty, active duty for training, or inactive duty for training must be reflected in relevant service department records.

APPEARANCES: James N. Frank, Venetie, Alaska, pro se; Joseph D. Darnell, Esq. Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

### OPINION BY ADMINISTRATIVE JUDGE PRICE

On March 3, 2003, the Bureau of Land Management (BLM) issued a decision rejecting James N. Frank’s application for a Veteran Native Allotment, FF-93603, filed pursuant to the Alaska Native Veterans Allotment Act (the Act or the ANVAA), as amended, 43 U.S.C. § 1629g (2000 Supp.). BLM rejected the application on the ground that Frank did not complete the required 6 months of active military duty necessary to qualify him to receive a Veteran Native Allotment under the Act, and further, that the land he applied for was unavailable for disposition pursuant to ANVAA. Frank’s application indicated that he served in the Army National Guard of Alaska from July 9, 1969, to October 16, 1979.

BLM based its decision concerning Frank’s record of military service upon Frank’s “Armed Forces of the United States Report of Transfer or Discharge,” Form DD-214. That document reported that Frank entered the United States Army on February 13, 1969, and in the Transfer or Discharge Data section of the form, stated that he was “Released from Active Duty and returned to State Control as a

member of the Army National Guard of Alaska to complete remaining Service obligation” on July 9, 1969. Form DD-214 reported Frank’s “net service” to be 4 months and 27 days.

On March 25, 2003, a field representative for the Bureau for Indian Affairs (BIA), Fairbanks (Alaska) Field Office, wrote a transmittal letter to BLM enclosing “the original appeal response for the application from James N. Frank for further processing. In his undated letter, Frank requested that his application be changed to reflect an enlistment date of February 13, 1969, and that he was “out of basic training” on July 13, 1969. Additionally, he requested that BLM permit him to amend the location of the allotment he sought in accordance with maps attached to his letter on which he indicated the erroneous and correct sites of the allotment. BLM did not respond to this request to amend the application, but forwarded Frank’s request to the Board, where it was received on March 27, 2003, and docketed as IBLA 2003-179.

On April 9, 2003, BIA transmitted to the Board a copy of a second letter dated April 7, 2003, from BIA to BLM. That letter stated that “[t]he Bureau of Indian Affairs -- Fairbanks Field Office is requesting a withdrawal of the notice of appeal, without prejudice for the application of James N. Frank.” Frank filed nothing with the Board in response to, or in conjunction with, this submission from BIA. However, on April 23, 2003, the Board dismissed the appeal “without prejudice to an appeal of a future decision by BLM regarding a Veteran Native Allotment application.” (Order dated April 23, 2003.)

On May 5, 2003, Counsel for BLM filed a motion with the Board entitled “Motion to Vacate Appeal Dismissal and to Decide Appeal on the Merits.” We construed that document to be a request for reconsideration of our April 23, 2003, dispositive order. See 43 CFR 4.21(d); 43 CFR 4.403. In that motion, BLM argues that BIA lacked authority to represent Frank in the appeal to this Board. More fundamentally, however, BLM argues that, even assuming Frank’s allegation that he was in basic training from February 1969 through July 1969 is correct, the decision should be affirmed on the merits and the appeal dismissed because Frank does not qualify for an allotment pursuant to 43 U.S.C. § 1629g(b)(1) (2000 Supp.), as his active duty status was less than 6 months.

On May 21, 2003, the Board received a motion entitled “Correction to Motion to Vacate Appeal Dismissal and to Decide Appeal on the Merits.” In that motion, BLM acknowledged error in its motion to the extent it asserted that Frank had been in active duty status from February 13, 1969, to July 9, 1969. Thus, BLM now contends that Frank can not qualify for an Alaska Native allotment under ANVAA. Specifically, BLM argues that Frank’s service record does not qualify him as a “veteran” under the Act, because all of his time in service was for training purposes.

Frank did not respond to BIA's correspondence, and he did not respond to BLM's Motion to Vacate or its Correction to Motion to Vacate.

BLM has demonstrated good cause for reconsideration of this matter. BLM is correct that BIA had no authority to represent Frank and therefore could not properly move to withdraw his appeal. The Board thus erred when it acted on BIA's request.<sup>1/</sup> Our order of April 23, 2003, is herewith vacated and the appeal is reinstated. We agree, however, that BLM's decision must be affirmed on the merits,<sup>2/</sup> as Frank has not demonstrated that his military service qualifies him for a Native Allotment pursuant to ANVAA.

[1] Veterans meeting certain qualifications may be eligible for a Native allotment pursuant to section 432 of the "Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999," Pub. L. No. 105-276, 112 Stat. 2461, 2516-18 (Oct. 21, 1998), which amended the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1629 (2000), by adding a new section 41. Section 41 of ANCSA permitted a "person described in subsection (b)" an "Open Season for Certain Alaska Native Veterans for Allotments," during an 18-month period subsequent to its 1998 date of enactment.<sup>3/</sup> During that time, a qualifying person would be, under specific circumstances, "eligible for an allotment of \* \* \* federal land totaling 160 acres or less under the Act of May 17, 1906 (chapter 2469; 34 Stat. 197), as such Act was in effect before December 18, 1971."<sup>4/</sup>

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<sup>1/</sup> BIA is generally not authorized to represent Native allotment applicants in matters coming before this Board. 43 CFR 1.3; see Unknown Heirs of Migley Kelly, 41 IBLA 387, 389 (1979); Ernest L. Olson, Jr. (Deceased), 41 IBLA 179, 181-82 (1979).

<sup>2/</sup> BLM has argued that Frank's appeal should be dismissed (Motion to Vacate at 3), but dismissal is not an appropriate disposition of a decision on the merits.

<sup>3/</sup> The statute provides that such applications may be filed during the 18 months "following promulgation of implementing rules." 43 U.S.C. § 1629g(a)(1) (2000 Supp.). Implementing regulations provide that an application will be considered timely if postmarked between July 31, 2000, and Jan. 31, 2002. 43 CFR 2568.70, 2568.72. Frank's application was postmarked on Jan. 30, 2002, and received by BLM on Feb. 1, 2002.

<sup>4/</sup> This statute is the Alaska Native Allotment Act, formerly codified at 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed by section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2000). The repeal of this statute meant that all applications for Native allotments had to be filed on or prior to Dec. 18, 1971.

Section 41(b) identified the persons eligible to select an allotment under the new provision. The statute restricted this opportunity to “veterans” who served between January 1, 1969, and December 31, 1971. 43 U.S.C. § 1629g(b)(1)(B) (2000 Supp.). The veteran’s military service dates must have included “at least 6 months between January 1, 1969 and June 2, 1971,” or the veteran must have enlisted or been drafted into military service after June 2, 1971, but before December 3, 1971. *Id.*; *see also* 43 CFR 2568.50(c). The statute thus reopened the application period to those persons who had been in military service during the last two years in which ANVAA applications could be filed and missed the opportunity to timely apply for that reason.

[2] Departmental regulation 43 CFR 2568.30 assigns “veteran” the same meaning as that prescribed in 38 U.S.C. § 101 paragraph 2. Title 38 of the U.S. Code, pertaining to “Veterans’ Benefits,” defines “veteran” as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable” (emphasis supplied). 38 U.S.C. § 101 (2) (2000). “Active military, naval, or air service” is defined by statute and regulation as including

active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty or from a covered disease which occurred during such training.

38 CFR 3.6(a) (2002); *see also* 38 U.S.C. § 101 (24) (2000).

[3] “Active duty” generally means “full-time duty in the Armed Forces, other than active duty for training.” 38 CFR 3.6(b) (2002); *see also* 38 U.S.C. § 101 (21) (2000). Persons serving in a reserve component of the military who have not been mustered into active duty in the Armed Forces are deemed to be in either active duty for training, or inactive duty for training, depending upon the nature of the duty undertaken. 38 U.S.C. § 101 (22), (23) (2000); 38 CFR 3.6(c) (2002). Whether an individual’s service constitutes active duty, active duty for training, or inactive duty for training must be reflected in relevant service department records. *Venturella v. Gober*, 10 Vet. App. 340, 341 (1997) (“Only service department records can establish if and when a person was serving on active duty, active duty for training, or inactive duty for training”); *see also* 38 CFR 3.203 (2002) (service department records as evidence of service and character of discharge).

In the instant case, Frank has provided no service records establishing that he was in active duty status in the military, naval, or air service. To the contrary,

Frank's Form DD-214 shows that, after completion of a net service of 4 months and 27 days in "MOS Training," Frank was released from the U.S. Army to the Army National Guard of Alaska. (Armed Forces of the United States Report of Transfer or Discharge, Form DD-214.) Frank has provided no service records establishing that he was called to active duty status during the time he was in the Army National Guard. It follows that Frank is not a "veteran" for purposes of ANVAA, and is not qualified to apply for a Native allotment pursuant to that Act. See 43 CFR 2568.30; George F. Jackson, 158 IBLA 305, 307 (2003); Robert P. Vlasoff, 158 IBLA 380, 382 (2003). The decision is modified accordingly.

Therefore, pursuant to the authority granted to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, our April 23, 2003, order is vacated, Frank's appeal is reinstated, and the decision appealed from is affirmed as modified herein.

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T. Britt Price  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge